SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
SEP 4 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

CASE NO. 73-411

BERNARD BERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN W. PRUNTY, ESQUIRE
Attorney for the Petitioner
837 City National Bank Bldg.
Miami, Florida

MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT	1
DECISIONS TO BE REVIEWED	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT	6
CONCLUSION	10
CERTIFICATE OF SERVICE	11

AUTHORITIES

Case	Page
Barnes v. United States, 37 L.Ed.2d 380, 93 S.Ct. ___, ___ U.S. ___, #72-5443	7, 8
In Re Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970)	9
Leary v. United States, 395 U.S. 623, L.Ed.2d 57, 89 S.Ct. 1532 (1969)	9
United States v. Cameron, 460 Fed.2d 1394 (1972)	6, 7

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

Rule 19, 1(b), Supreme Court Rules	2
18 U.S.C., §371	3
18 U.S.C., §1708	3, 4
28 U.S.C., §1254(1)	2

In the Supreme Court of the United States

OCTOBER TERM, 1972

CASE NO. _____

BERNARD BERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, BERNARD BERMAN, prays that a Writ of Certiorari issue to review certain Opinions and Orders of the United States Court of Appeals for the Fifth Circuit entered September 11, 1972 and August 6, 1973, in Case No. 71-1673.

DECISIONS TO BE REVIEWED

The Opinion and Order of the United States Court of Appeals for the Fifth Circuit dated September 11, 1972, not yet reported (A. 1-19), affirming the conviction of the Petitioner and two other defendants upon charges of substantive and conspiracy violations of 18 U.S.C. 1708 (possessing property stolen from the mails) is presented for review. Likewise, the Opinion and Order of the United States Court of Appeals for the Fifth Circuit dated August 6, 1973, not yet reported (A. 20), denying the Petition for Re-Hearing of the Petitioner is presented for review.

JURISDICTION

The original Opinion and Order of the Court of Appeals of the Fifth Circuit was entered September 11, 1972. A timely Petition for re-hearing and for hearing en banc was denied by Opinion and Order on August 6, 1973. This Petition for Certiorari was filed within thirty (30) days of August 6, 1973. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 19, 1(b), Supreme Court Rules.

QUESTION PRESENTED

WHETHER EVIDENCE OF POSSESSION OF STOLEN NEGOTIABLE SECURITIES, ELEVEN MONTHS AFTER THEFT, PERMITS THE TRIAL COURT TO CHARGE THE JURY THAT A REASONABLE INFERENCE MAY BE DRAWN THEREFROM THAT THE POSSESSOR KNEW THE SECURITIES WERE STOLEN.

"A" refers to appendix to petition. "T" refers to the trial transcript.

STATUTORY PROVISIONS INVOLVED

18 U.S.C., §371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U.S.C., §1708:

"Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

Petitioner was indicted on one count of conspiracy to violate Title 18 U.S.C., §1708, by receiving and having in his possession stolen negotiable securities, knowing the same to have been stolen from the United States mail. The Petitioner was further charged in a second count with a substantive offense of violating Title 18 U.S.C., §1708 (A. 21-25).

The case went to trial on November 16, 1970, in the United States District Court in and for the Southern District of Florida, and the jury returned a verdict on November 30, 1970 finding the Petitioner guilty on both counts. The two other defendants, tried at the same time with the Petitioner, were likewise found guilty.

After considering and denying post-trial motions the Trial Court sentenced the Petitioner on March 31, 1971, and an appeal was timely filed with the Court of Appeals of the Fifth Circuit.

The defendant was charged with the possession of five (5) debenture bonds of the Chesapeake and Potomac Telephone Company issued in the nominee or "street" name of "Cal & Co.". By business records, the Government proved that the bonds together with hundreds of other securities had been mailed on June 13, 1968 from New York to Boston, but never arrived at their designation. Eleven months later one of Petitioner's co-defendants was found in possession of the five (5) debenture bonds in Miami, Florida.

The Government made no claim that Petitioner participated in any way in the theft of the bonds. Moreover, proof of one of the essential and principal elements of the crime charged, i.e., knowledge of the stolen nature of the bonds was wholly dependent upon evidence which was entirely circumstantial.

At the conclusion of the evidence the Court gave this instruction:

> "Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of the surrounding circumstances shown by the evidence in the case that the person in possession knew the property had been stolen." (T 1322)

It was not until May 8, 1969 that the debentures, being only a small part of the items mailed June 18, 1968 and not received, were discovered in the possession of Petitioner's co-defendant.

ARGUMENT

WHETHER EVIDENCE OF POSSESSION OF STOLEN NEGOTIABLE SECURITIES, ELEVEN MONTHS AFTER THEFT, PERMITS THE TRIAL COURT TO CHARGE THE JURY THAT A REASONABLE INFERENCE MAY BE DRAWN THEREFROM THAT THE POSSESSOR KNEW THE SECURITIES WERE STOLEN.

The issue here presented is a simple one. It is the Petitioner's contention that the stolen property involved does not constitute recently stolen property.

While it is conceded that "recent" is a relative term without fixed meaning, a proper line must be drawn as a matter of law beyond which no jury should be permitted to regard property as recently stolen.

The giving of the Court's instruction under the factual situation presented in the case sub judice was error. The inference permitted by an unexplained possession of stolen property is an extremely powerful inference and becomes a substitute for direct proof of guilty knowledge. When it is permitted to be applied in a situation in which possession of the stolen items is so remote in point of time as to be totally lacking in rational connection between the unexplained possession and knowledge of the theft, as in case of the Petitioner, his rights under the due process clause of the Constitution of the United States are violated.

We are aware of the decision of the Fifth Circuit Court of Appeals in the case of *United States v. Cameron*,

460 Fed.2d 1394 (1972), whereby a conviction of the offense of receiving stolen currency was reversed on the basis that an instruction, similar to the one given the jury in the case involving the Petitioner, was improper. The instruction was struck down because it permitted the Government to pyramid the requisite element of knowledge on top of the requisite element of possession without the necessity of the Government coming forward with a single additional evidentiary fact bearing on knowledge by the defendant of the stolen character of the money involved.

We are further aware that the Fifth Circuit Court of Appeals in denying Petitioner's Petition for re-hearing stated that the case of *Barnes v. United States*, 37 L.Ed.2d 380, 93 S.Ct. ____, ____ U.S. ____, #72-5443, decided by this Court June 18, 1973, had been resolved against the Petitioner on the issue presented in his Petition for re-hearing based on *United States v. Cameron*. The Court of Appeals having delayed its disposal of the Petitioner's re-hearing application pending this Court's final decision in the *Barnes v. United States* case.

However, Petitioner contends that the case sub judice is distinguishable from *Barnes v. United States* and the Court of Appeals failed to recognize this distinction. The distinction consists of the fact that almost a year transpired from the date of the theft to the date of the possession of the stolen property by one of the Petitioner's co-defendants.

Barnes v. United States dealt with a factual situation in which the defendant obtained possession of government checks which were mailed by the United States Disbursing Office at San Francisco on July 1st and July 3rd, 1971. The checks were deposited by the defendant in an account

which he controlled on July 8th, this was seven (7) days after the theft or, in fact, the posting of the checks which it was claimed failed to reach the designated payees. *Barnes v. United States* does not deal with a situation in which eleven (11) months separates the theft or loss of the checks to the date of deposit or receipt by the defendant. It is submitted that if such a factual situation had been presented, this Court could not have come to the conclusions set forth in the Opinion in *Barnes v. United States.*

While the Petitioner agrees with the able dissents expressed by Justices Douglas, Brennan and Marshall as expressing the true interpretation of the intent of the Bill of Rights; the majority opinion cannot be applied to the case sub judice because it is completely lacking in any reasonable delimiting outlook on the application of the meaning of "recently stolen."

If the *Barnes v. United States* Opinion is to be accepted and applied in all cases involving the possession of stolen items some judicial limitation must be placed upon the term "recently." To submit to the unbridled and uninstructed discretion of the jury, a determination of this term, is to permit the jury to convict a defendant upon insufficient evidence or upon an inference based upon another inference, so remote as to be practically imperceptible. This procedure strikes at the very heart of the basic safeguards of our system of criminal jurisprudence.

Petitioner does not insist that the limit on "recently" be placed at one month, two months or six months, the objection is to the fact that this instruction as now given has no limitation and could be conceivably given in a situation where ten years separated the theft and the possession.

It destroys completely any significance which can be attributed to the word "recently" and causes such an instruction to have no distinction from an instruction which completely omits the word.

The uncertainty of this condition should not be permitted to stand and in the case sub judice, failure of the Court to limit the term "recently" was highly prejudicial and constituted error which the Court of Appeals failed to recognize in its desire to be guided by *Barnes v. United States.*

The practical effect of the instruction with reference to Petitioner was to permit the jury to convict the Petitioner upon their own uninstructed determination of "recent." It had the effect of authorizing the jury to rely exclusively on the inference, however remote, in determining the element of knowledge of the stolen property and relieved the Government of the burden of proving the element of knowledge beyond a reasonable doubt.

The Petitioner submits that this action violates the principles enunciated in *In Re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970), which case firmly re-established the principles that the due process of law requires proof beyond a reasonable doubt of every fact necessary to constitute the crime.

The jury in the case involving the Petitioner was left to the device of drawing upon their "common sense" and this simply was not sufficient to permit the inference, under the circumstances that were involved, that the possessor of stolen securities knew that the same were stolen. *Leary v. United States*, 395 U.S. 623, L.Ed.2d 57, 89 S.Ct. 1532 (1969).

CONCLUSION

The instruction with reference to the possession of recently stolen property, creating thereby an inference that the possessor of the property knew it to be stolen, given to the jury without any limitation or definition of the term "recently" was improper and harmfully prejudicial. Such an instruction, if permitted to be used without limitation, will seriously impair our system of criminal justice. The issue demands an exercise of this Court's power of supervision and a Writ of Certiorari should, therefore, issue to review the Judgment and Opinion of the Fifth Circuit pertaining to this Petitioner.

Respectfully submitted,

VARON and STAHL, P.A.
2432 Hollywood Boulevard
Hollywood, Florida 33020

and

JOHN W. PRUNTY, ESQ.
837 City National Bank Bldg.
Miami, Florida 33130
Counsel for Petitioner

By:_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the within Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this ____ day of _____, A.D., 1973, to the following:

Office of the United States Attorney
300 Ainsley Building
14 N.E. 1st Avenue
Miami, Florida

KELLY, BLACK, BLACK & KENNY, P.A.
1409 Alfred I. duPont Bldg.
Miami, Florida 33131
Counsel for Pedro Martinez

GEORGE D. GOLD, ESQ.
Suite 511, Biscayne Bldg.
Miami, Florida 33130
Counsel for A. Earl Walters

INDEX TO APPENDIX

		Page
1.	OPINION OF THE COURT OF APPEALS	App. 1
2.	ORDER DENYING PETITION FOR REHEARING AND HEARING EN BANC	App. 20
3.	INDICTMENT	App. 21

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1673

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PEDRO M. MARTINEZ, A. EARL WALTERS
and BERNARD BERMAN,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(September 11, 1972)

Before WISDOM, GODBOLD and RONEY,
Circuit Judges.

RONEY, Circuit Judge: We affirm the convictions of all three defendants for conspiracy and possessing securities stolen from the mails. 18 U.S.C. §§371, 1708 and 2.

$500,000 worth of Chesapeake and Potomac Telephone Company bonds were shipped by registered mail from Bankers Trust Company of New York to First National Bank of Boston. They never arrived. Eleven months later

the same debentures were delivered to Jefferson National Bank of Miami Beach in connection with a purchase for which Jefferson was to act as escrow agent. A check on the validity of the securities resulted in the F.B.I. and postal inspectors being informed. This prosecution resulted. Martinez, Walters, and Berman were each convicted of conspiracy to receive and possess securities stolen from the mails and of the substantive offense of receiving and possessing securities stolen from the mails.

It is unnecessary to recite the details. A general view of the evidence finds defendant Berman discussing with other co-conspirators the disposition of stolen securities, among which were the Chesapeake and Potomac bonds. Subsequently, defendant Martinez opened an account at Jefferson National in the name of Associated Insurance Investors, Inc., a corporation for which Martinez and defendant Walters were listed as officers, and "care of Bernard Berman" was listed as an address. An accounting firm was asked to prepare a balance sheet for Associated which they were told was needed in order for Associated to purchase an English insurance company. The balance sheet reflected $500,000 as "funds held in escrow, purchase Pendragon Company," which figure was supplied by Martinez. A check for $50,000 was drawn on the Associated account in Jefferson National payable to the order of Martinez, signed by both Martinez and Walters. The check was endorsed in exchange for a cashier's check payable to Bernard Berman, which he cashed. He gave the $50,000 to Robert Cardillo, who together with Vincent Teresa, was in possession of the stolen securities involved in the first conversations with Berman. Three days later the bonds were delivered to Jefferson National with escrow and other documents concerning the purchase of Pendragon. Thereupon the

validity check was made and the stolen character of the bonds was discovered.

Each defendant asserts different grounds for reversal.

BERMAN

Appellant Berman raises two issues on his appeal: first, that prejudicial remarks by the prosecutor in his closing argument violated appellant's right to a fair trial; and second, that testimony of a government witness was inadmissible and destroyed appellant's character before his character was placed in issue.

(1) Prosecutor's Remarks

During the course of his closing argument, the prosecutor remarked:

> "Because old lawyer Berman was fixer lawyer Berman and old lawyer Berman's purpose in the entire conspiracy was to arrange to get the legal maneuvering set up, the corporate set up to satisfy the British Board of Trade."

No objection was made at the time to the prosecutor's remarks. Later in the argument counsel for Berman, while making another objection, as an afterthought, made a delayed objection to the use of the term "fixer." The court then instructed the jury that it was to disregard any reference to the term "fixer," was to base its decision solely on the evidence in the case and the law, and was not to base its decision on characterizations by the government attorney.

Considering the prosecutor's statement as a whole and the court's cautionary instructions given when requested, we find no reversible error.[1]

Further in his argument, the prosecutor made two references to Berman's having lied on the stand and a government witness having told the truth. Counsel for Berman failed to object to these remarks at the time. He urges now, however, that the prosecutor was stating his individual belief in the guilt of the accused and that such belief was based on evidence not before the jury.

The law is clear that a prosecutor's remarks cannot imply that evidence not before the jury implicates the defendant. McMillan v. United States, 363 F.2d 165 (5th Cir. 1966). Nor can a prosecutor vouch for a witness by suggesting that the government would not use a witness unless his credibility was confirmed. Gradsky v. United States, 373 F.2d 706 (5th Cir. 1967). We do not find either infirmity in the present case. In McMillan we said that a prosecutor may express his belief in the guilt of a defendant if such belief is based solely on the evidence introduced and the jury is not led to believe that other evidence justifies that belief. We read nothing more in the prosecutor's statement than an attempt to point out the apparent inconsistencies in Berman's testimony.

(2) Testimony of Government Witness

The government made an in camera proffer that the testimony of Vincent Teresa would deal with conversations

[1]Berman cites to us a case in which the prosecutor's remarks were clearly prejudicial. See Getchell v. United States, 282 F.2d 681 (5th Cir. 1960). But compare United States v. Crane, ____ F.2d ____ (5th Cir. 1971) [No. 30229, June 14, 1971].

and transactions that took place in early 1969, approximately three months before the date the indictment alleged to be the beginning of the conspiracy. The court allowed such testimony to go to the jury for the purpose of showing knowledge and intent on the part of Berman.

The general rule is that evidence of prior criminal activity of a similar nature is inadmissible to prove the commission of a later offense. Michelson v. United States, 335 U.S. 469 (1948). There is, however, an exception to the general rule. When "intent and knowledge are essential elements of the crime for which the defendant is being tried, evidence of other transactions, even though criminal in nature, is admissible to prove the necessary criminal intent or guilty knowledge, if the transactions are so connected with the offense charged that they serve to show a general pattern." Gilstrap v. United States, 389 F.2d 6, 9 (5th Cir. 1968), cert. den. 391 U.S. 913 (1968).

Berman says that the theory of the government's case was that he had participated in a complicated plan to use stolen securities as collateral for the purpose of buying and maintaining a British insurance company but that Teresa was barred from referring to the insurance company scheme because the trial judge had determined that such reference would be prejudicial to one of the other co-defendants. Under these circumstances, Berman argues that Teresa's testimony was irrelevant and prejudicial to him in that there was no similarity as far as scheme or plan in that testimony and the evidence adduced at trial by the government relative to the method used to dispose of the securities.

Briefly stated, Teresa testified to conversations and

transactions between Berman, himself, and another about the disposition of the stolen securities. This testimony was directly related to the crimes charged against Berman in both point of time[2] and factually.[3] Simply because Teresa was not allowed to testify as to one point of the discussion, i.e., the buying of a British insurance company, does not vitiate the relevance and probative value of the evidence given as to Berman's intent and knowledge in connection with his participation and involvement in the overall plan or scheme.

This testimony comes well within the Gilstrap exception admitting such evidence of a general pattern of criminal activity for the purpose of showing intent and knowledge.

WALTERS

Appellant Walters raises four issues: first, insufficiency of the evidence to link him to the conspiracy; second, the testimony of government witness Teresa was so prejudicial to him that a severance should have been granted; third, error in refusing to give an "aider-abettor" instruction to the jury; and fourth, insufficiency of evidence of a conspiracy involving Walters prior to the admission against him of a statement made by a co-conspirator.

---

[2]Teresa testified that the conversations with Berman commenced within two or three months of the beginning date of the conspiracy charged in the indictment.

[3]Teresa testified that (1) the conversations dealt with stolen stocks and bonds, (2) Bobby Cardillo was present and took part in the conversations, (3) the formation of a phony corporation was discussed (4) they discussed the naming of the corporation, and (5) they considered naming the corporation Cal & Co., which was one of the street names on the stolen bonds. This testimony was substantially corroborated by other evidence introduced at trial.

(1) Sufficiency of Evidence

In deciding the sufficiency of the evidence we must take the view most favorable to the government. Glasser v. United States, 315 U.S. 60 (1942). And, of course, when the evidence relied on is circumstantial, we must determine whether the trier of fact might reasonably find that the evidence excludes every reasonable hypothesis except that of guilt. United States v. Manuel Sidan-Azzam, _____ F.2d_____ (5th Cir. 1972) [No. 71-2109, April 7, 1972].

The evidence shows the following:

Walters was the Secretary-Treasurer of Associated Insurance Investors, Inc., a Nevada corporation, of which Martinez was President. Walters signed a trust agreement between Associated and Jefferson National Bank of Miami Beach in which some stolen securities were assigned to Jefferson National as Trustee. He signed an attorney-in-fact agreement dated May 8, 1969, between Associated and Berman wherein Berman was authorized to exercise the power of direction under the Trust Agreement. Associated's lease of a suite was signed by Walters. His mortgage broker office was maintained in Associated's suite. A check drawn on Jefferson National payable to check drawn on Jefferson National payable to Martinez was signed by Walters. He signed the corporate resolutions of Associated dated April 14, 1969, and filed with Jefferson National. Walters made three trips to Alaska with Martinez and a co-conspirator, who paid for his passage. He was one of the officers of Associated present when Berman first met with them.

Viewed most favorably to the government, this evidence against Walters was such that the jury could decide beyond a reasonable doubt that he was involved in the conspiracy.

(2) Teresa's Testimony

Teresa testified as to conversations between himself, Berman and others. This testimonial evidence was introduced against Berman. The court instructed the jury on three occasions—all critical points in the trial—not to consider Teresa's testimony against any defendant but Berman. In these circumstances, we think it was entirely within the jury's capacity to follow the court's instructions. Blachly v. United States, 380 F.2d 665 (5th Cir. 1967).

Separate trials are not automatically required where some of the evidence is not admissible against a particular defendant. Opper v. United States, 348 U.S. 84 (1954).

A motion for severance is addressed to the sound discretion of the trial court. The exercise of that discretion will not be overruled unless it was clearly abused. United States v. Dryden, 423 F.2d 1175 (5th Cir. 1970), cert. den. 398 U.S. 950 (1970).

Considering the record as a whole, we do not find an abuse of discretion by the trial court in denying Walters' motion for severance.

(3) "Aider-Abettor" Instruction

Walters requested an instruction spelling out the requirements for a conviction as an aider and abettor, citing Moore v. United States, 356 F.2d 39 (5th Cir. 1965).

The court was not in error in denying this charge with the note that this was not in issue. Walters was not charged as an aider and abettor, but as a conspirator. Once it is established that a person is a member of a conspiracy, any act by a co-conspirator in furtherance of the conspiracy is attributable to him. Pinkerton v. United States, 328 U.S. 640 (1946). In order to convict Walters of the substantive count, it was not necessary to prove that he aided and abetted the possession of the securities. The government need prove only that Walters' co-conspirator possessed the securities in furtherance of the conspiracy.

(4) Evidence of Co-Conspirator's Statement

Walters' last contention is that there was not sufficient evidence of a conspiracy involving him at that point in the trial when a government witness, Kalinsky, was allowed to testify about a statement made by an alleged co-conspirator.

It is true that hearsay statements are inadmissible when no independent evidence links the declarant to the defendant or to the conspiracy. Glasser v. United States, supra; United States v. Bey, 437 F.2d 188 (3rd Cir. 1971); United States v. Calabro, 449 F.2d 885 (2nd Cir. 1971); United States v. Geaney, 417 F.2d 1116 (2nd Cir. 1969); United States v. Borelli, 336 F.2d 376 (2nd Cir. 1964). However, Kalinsky was the government's last witness of substance. Prior to his testimony the court had before it substantially all of the evidence against Walters which we have held was sufficient to show that he was involved in the conspiracy. This meets the test required for admission of Kalinsky's testimony.

MARTINEZ

Appellant Martinez asserts the following grounds for reversal: (1) the government's proof exceeded the confines of its Bill of Particulars; (2) he was prejudiced by being tried with Berman; (3) the government did not prove that Martinez knew the securities were stolen from the mail; (4) the court's instruction on inference from possession should not have been given; and (5) the indictment returned solely on the basis of hearsay evidence should have been dismissed.

(1) Proof Beyond Bill of Particulars

Martinez contends that the government's evidence showed that witness Teresa was a co-conspirator. Since Teresa was not so named in the Bill of Particulars, the argument is that the proof exceeded the confines of the Bill.

The purposes of a Bill of Particulars are to inform the defendant of the nature of the charge against him with sufficient precision to enable him to prepare his defense, and to avoid or minimize the danger of surprise at trial. United States v. Bearden, 423 F.2d 805 (5th Cir. 1970), cert. den. 400 U.S. 836 (1970). Martinez claims surprise.

Teresa's testimony was introduced by the government for the sole purpose of showing intent and knowledge on the part of Berman, and the testimony was so limited by the court.

The record reflects that the prosecutor did not know of Teresa's existence until the day the trial commenced, and Teresa was not interviewed until the eve of his testi-

mony. The prosecutor then informed defense counsel of his intention to call Teresa as a witness, turned over to defense counsel material for use in cross-examination, and proffered Teresa's entire testimony.

It is obvious that the prosecutor could not have supplied Teresa's name before he had knowledge of his involvement. The issue then is whether Martinez' substantial rights were prejudiced in any way by the court's allowing Teresa to testify. See Wong Tai v. United States, 273 U.S. 77 (1927).

The prosecutor informed counsel of his intention to call Teresa as soon as practicable after learning of his existence and his relationship to Berman. Materials for cross-examination of Teresa were given counsel and Teresa's entire testimony was proffered during an extended in camera hearing. The testimony was considerably limited by the court.

In these circumstances we do not think that Martinez' substantial rights were prejudiced by the court's allowing Teresa's testimony.

(2) Severance

Martinez alleges he was prejudiced by being tried with Berman because (a) their defenses conflicted, (b) the jury was not able to avoid considering Teresa's testimony against Martinez, and (c) the prosecutor in rebuttal used Teresa's testimony to prove one of the essential elements of the crime against Martinez.

Rule 14 of the Federal Rules of Criminal Procedure provides that:

> "If it appears that a defendant . . . is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials or counts, or grant a severance of defendants or provide whatever other relief justice requires."

The trial court's decision to deny a motion for severance will not be overturned absent an affirmative showing of abuse of discretion. Blachly v. United States, supra. Speculative allegations as to possible prejudice do not mean the burden of such affirmative showing. See Gordon v. United States, 438 F.2d 858 (5th Cir. 1971).

In support of his claim of prejudice, Martinez says in his brief that if he had testified, his testimony would conflict with the testimony of Berman on certain facts in the case. He argues that such conflict prevented him from testifying in his own behalf. This argument is speculative. In United States v. Robinson, 432 F.2d 1348, 1351 (D.C. Cir. 1970), the court said:

> "In order to demonstrate abuse of discretion by a trial judge, one must show more than the fact that co-defendants whose strategies were generally antagonistic were tried together . . . . At the very least, it must be demonstrated that a conflict is so prejudicial that differences are irreconcilable, and 'that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' "

The logical significance to be drawn from Robinson is that conflicts among defendants do not per se require severance. Martinez is thus left to show affirmatively an abuse of discretion on the part of the trial court in denying severance. We do not think he has met that burden.

Martinez' claim that the jury was incapable of considering Teresa's testimony only against Berman is unmeritorious for the reasons given in our discussion of Walters.

It is claimed that the prosecutor used the testimony of Teresa against all three defendants in his rebuttal argument. It is the court's job to inform the jury as to what evidence should be considered against a defendant. The court fully instructed the jury regarding the effect of Teresa's testimony.

(3) Knowledge That Securities Stolen

Martinez suggests that this Circuit requires proof of knowledge on his part that the securities were actually stolen from the mails in order to convict him of violating 18 U.S.C. §1708. He relies principally on our decision in Allen v. United States, 387 F.2d 641, 642 (5th Cir. 1968), wherein Judge Bell wrote:

> "To procure a conviction in a case such as this the prosecution must show possession on the part of the defendant, that the letter was stolen from the mails, and that the defendant knew the letter and its contents had been so stolen."

The argument is made that the word "so" modifies "stolen

from the mails" thus making knowledge that the securities were stolen from the mail a legal requirement.

This was not the import of the Allen decision. We held in Allen that there was no evidence that the defendant or anyone else had actually stolen the letter from the mails. Martinez' situation is different. There was sufficient evidence adduced at the trial to show that the securities were actually stolen from the mails. This being so, it was only necessary to show that Martinez had possession of the securities, knowing them to be stolen. This principle is set forth in United States v. Hines, 256 F.2d 561 (2nd Cir. 1958), which we cited favorably in the Allen case. Hines involved a factual situation similar to the case at bar and clarified the law with regard to Section 1708 as follows:

> "The defendant claims that these facts do not constitute a violation of 18 U.S.C. §1708, which, he contends, requires that the accused know that the mail matter was stolen from an authorized mail depository, and not just stolen. Prior to 1939, the statute supported the defendant's argument. * * * But in that year the statute was amended to require only that the defendant know that the mail matter in his possession was stolen. 53 Stat. 1256. And Congress passed this amendment to alleviate the almost impossible burden cast upon the government under the prior Act to show that an accused knew how the mail in his possession was stolen. H.R. Rep. No. 734, 76th Cong., 1st Sess.; Sen. Rep. No. 864, 76th Cong., 1st Sess.

> To secure a conviction here, therefore, the prosecution had to show that the check actually had been stolen from the mails and that the defendant unlawfully possessed it, knowing that it was stolen."

(4) Instruction Concerning Possession of Recently Stolen Property

The court instructed the jury that it could draw an inference as to knowledge of theft from the unexplained possession of recently stolen property. Martinez alleges error in this charge on the basis that the eleven months between the mailing of the securities and his alleged possession is not indicative that the securities had been recently stolen. The argument continues that such a hiatus vitiates, as a matter of law, the rational basis on which the jury could make the proper nexus between unexplained possession and knowledge of theft. He cites the following language from Hale v. United States, 410 F.2d 147, 150 (5th Cir. 1969);

> "The inference allowed by unexplained possession is a powerful one. It is a substitute for direct proof of guilty knowledge and courts, both trial and appellate, should proceed with extreme care in determining whether the evidence sufficiently establishes a basis for the inference."

After giving this cautionary admonition and stating that the issue of what constitutes "recent" is a jury question, the court goes on to suggest the standards under which the inference may be allowed:

> "There is a likewise certain period after which an inference of guilty knowledge cannot be rationally inferred from unexplained possession. Whether this period has expired is a question for the trial court to determine before giving the case to the jury. In reaching its determination, the trial court need not be oblivious to other evidence pointing to the accused's guilt; to the contrary, it is free to judge the reasonableness of the inference in the context of all the evidence. Approaching the case sub judice in this manner, we conclude that the trial court did not err in allowing the jury to infer guilty knowledge from the appellant's unexplained possession of the automobile. To be sure, the lapse of six months and nineteen days substantially weakened the inference of guilty knowledge, but when the appellant's unexplained possession is analyzed in the context of a factual setting as fraught with suspicion as the one in this case, the inference is strengthened and doubt as to its reasonableness fades. Accordingly, we hold that the evidence against the appellant fairly included the inference to be drawn from unexplained possession of recently stolen property, and that the appellant's motion for a directed verdict of acquittal was properly denied." 410 F.2d at 151.

Under the Hale standards and considering the evidence against Martinez which was before the court, we do not find error in the instruction.

(5) Indictment Based on Hearsay

Prior to trial and at trial, Martinez moved to dismiss the indictment because it was based on hearsay testimony. In the alternative, he requested a hearing on its validity. After consideration, the court denied the motions without a hearing.

We view this claim as an attempt to litigate the sufficiency of the evidence presented to the grand jury. This has been foreclosed by the Supreme Court in Costello v. United States, 350 U.S. 359 (1956).

The judgment as to each appellant is affirmed.

AFFIRMED.

GODBOLD, Circuit Judge, Specially Concurring:

I concur in the result and add one point.

The court charged on the familiar rule that if a defendant is in possession of recently stolen property and does not explain his possession the jury is entitled to infer that he has knowledge of its stolen character. As to the defendant Martinez this charge just barely escapes being error, considering the lapse of eleven months between the disappearance of the securities and Martinez's transactions relating to them. But the court then charged that if the government had shown: (a) mailing and nonreceipt of the securities; (b) possession of them by a defendant; and (c) knowledge by the defendant that they were stolen, then the jury could infer that the sesurities were stolen from the mails. Martinez correctly asserts that this charge was error.

There is no substantial rational relationship between possession of stolen goods with knowledge of their illegal character and the facts surrounding the manner in which they were stolen. The circumstances of dealing with stolen goods have a rational relationship to knowledge of their illegal character — surreptitious dealings, changed names, sales not in regular course of business, discount prices, absence of title documents, and many other circumstances will tend to put a possessor on notice that he is dealing with illegal goods. But there is no such likelihood that a course of dealings will reveal to him the time, place and manner of the theft. And inquiry into that subject is unlikely. The less the dealer knows the better he will like it. As Judge Learned Hand put it in U. S. v. Bollenbach, 147 F.2d 199, 202 (2d Cir.), rev'd on other grounds 326 U.S. 608 (1946):

> It is of course possible that a man, dealing in stolen securities, and knowing or suspecting that they have in fact been stolen, may inquire where the seller got them; but it is more likely that he will not wish to do so. Inquiry is apt to add to that information any evidence of which he will at all hazards wish to suppress; it will be safer to take the securities as they are presented than to meddle into their source.

The tenuous nature of the "stolen from the mails" inference is even more attenuated than usual in the present case because one of the underpinnings — knowledge that the securities were stolen — was itself an inference that the jury was allowed to draw at the very outer limits of its rationality. This case is one of those rare ones in which the plaint of "inference or an inference" is substance rather than shibboleth.

The erroneous instruction was, however, error without injury as to Martinez. As the majority point out, Martinez's guilty knowledge was required to be only of "theft" and not, "theft from the mails." The inference erroneously permitted was only of "from the mails," a matter clearly established by other evidence.

[TITLE OMITTED]

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before WISDOM, GODBOLD and RONEY,
Circuit Judges.

PER CURIAM: Berman reasserts in his Petition for Rehearing and Petition for Rehearing En Banc his contention that Teresa's testimony should not be admitted at all, but we have previously decided that this evidence was properly admitted against him.

Barnes v. United States, — U.S. — [No. 72-5443, 13 Crim. L. R. 3153, June 18, 1973], has now resolved against the appellant the argument for rehearing based on United States v. Cameron, 460 F.2d 1394 (5th Cir. 1972).

The Petition for Rehearing filed on behalf of Bernard Berman is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

[TITLE OMITTED]

INDICTMENT

The Grand Jury charges:

COUNT I

Commencing prior to on or about April 1, 1969, and continuing through on or about May 9, 1969 in Dade County, in the Southern District of Florida

PEDRO M. MARTINEZ,
BERNARD BERMAN,
A. EARL WALTERS, and
STEPHEN J. DINNEEN

wilfully and knowingly did combine, conspire, confederate and agree together and with diverse other persons, unknown to the Grand Jury, to violate Title 18, United States Code, Section 1708; that is to say, buy, receive, and unlawfully have in their possession, securities which had been contained in registered mail and stolen therefrom, knowing same to have been stolen, taken, embezzled or abstracted; to wit:

> Five 40 year 6¾% debentures of the Chesapeake and Potomac Telephone Company of Virginia, due May 1, 2008, Certificate Numbers R-7-823, R-7-824, R-7-825, R-7-826, R-7-827 of a maturity value of $100,000 each, registered in the name of Cal & Co.

In furtherance of said conspiracy, the defendants committed the following overt acts:

OVERT ACTS

1. On or about April 1, 1969, Pedro M. Martinez, Bernard Berman, Alvin Earl Walters, and Stephen J. Dinneen met at Anchorage, Alaska, and assumed control of the Alaska Western Life Insurance Co. and Associated Insurance Investors, Inc.

2. On or about April 17, 1969 at Anchorage, Alaska, Stephen J. Dinneen drew Check No. 8431 on the account of Alaska Western Life Insurance Co. at the First National Bank of Anchorage, Anchorage, Alaska, in the amount of $55,000 in favor of Associated Insurance Investors, Inc., for the stated purpose of purchasing of United States Steel Company stock or equivalent.

3. On or about April 17, 1969, at Anchorage, Alaska, Pedro M. Martinez endorsed said Check No. 8431.

4. On or about April 17, 1969, at Anchorage, Alaska, Pedro M. Martinez caused one Richard S. Derryberry, as President of Alaska Western Life Insurance Co. to endorse Time Certificate of Deposit No. 2916, issued by the First National Bank of Anchorage, Anchorage, Alaska, in favor of the Alaska Western Life Insurance Co., in the amount of $70,000.

5. On or about April 21, 1969, at Anchorage, Alaska, Pedro M. Martinez caused one Mae Lujan, as an employee of Alaska Western Life Insurance Co. to present Time Certificate of Deposit No. 2916 for deposit to the account

of Alaska Western Life Insurance Co., and Check No. 8431 to the First National Bank of Anchorage, Anchorage, Alaska, and Pedro M. Martinez did thereby cause said bank to forward a sight draft in the amount of $54,990.26 to the Jefferson National Bank of Miami Beach, Florida, in the Southern District of Florida for deposit to the account of Associated Insurance Investors, Inc. at the Jefferson National Bank.

6. On or about April 28, 1969 in the Southern District of Florida, Pedro M. Martinez and A. E. Walters drew Check No. 118 on the account of Associated Insurance Investors, Inc. at the Jefferson National Bank of Miami Beach, in the amount of $800.00, payable to Stephen J. Dinneen, for expenses to cover the cost of securing the formation of Cal & Co., Ltd.

7. On or about April 30, 1969, Stephen J. Dinneen paid to King & King, 8 Cavendish Place, London, England, the sum of $160 for the formation of Cal & Company, Ltd.

8. On or about May 5, 1969, in the Southern District of Florida, Pedro M. Martinez withdrew $50,000 from the account of Associated Insurance Investors, Inc. at the Jefferson National Bank of Miami Beach.

9. On or about May 5, 1969, in the Southern District of Florida, Pedro M. Martinez purchased a cashier's check in the amount of $50,000 at the Jefferson National Bank of Miami Beach, and thereafter delivered said check to Bernard Berman.

10. On or about May 7, 1969, Bernard Berman cashed said cashier's check at the Jefferson National Bank of Miami Beach and received $50,000 in cash.

11. On or about May 8, 1969, in the Southern District of Florida, Bernard Berman, Pedro M. Martinez and A. E. Walters signed an Attorney-in-Fact Agreement between Associated Insurance Investors, Inc. and Bernard Berman.

12. On or about May 8, 1969, Pedro M. Martinez and Bernard Berman delivered to the Jefferson National Bank of Miami Beach, five 40-year Chesapeake and Potomac Telephone Company of Virginia 6¾% debentures, Due May 1, 2008, certificate Nos. R-7-823, R-7-824, R-7-825, R-7-826, and R-7-827 of a maturity value of $100,000 each, registered in the name of Cal & Co., and said Attorney-in-Fact Agreement.

All in violation of Section 371, Title 18, United States Code.

COUNT II

On or about May 8, 1969, at Miami Beach, Dade County, in the Southern District of Florida

PEDRO M. MARTINEZ

BERNARD BERMAN

A. EARL WALTERS and

STEPHEN J. DINNEEN

did unlawfully buy, receive, and have in their possession, securities which had been contained in registered mail and stolen therefrom, knowing same to have been stolen, taken, embezzled or abstracted, to wit:

Five 40-year 6¾% debentures of the Chesapeake and Potomac Telephone Company of Virginia, due May 1, 2008, Certificate Numbers R-7-823, R-7-824, R-7-825, R-7-826, and R-7-827 of a maturity value of $100,000 each, registered in the name of Cal & Co.

which were the contents of registered letter No. A 20701, mailed June 13, 1968 at New York, New York, by the Bankers Trust Company, New York, New York, addressed to the First National Bank, 67 Milk Street, Boston, Massachusetts; in violation of Title 18, United States Code, Sections 1708 and 2.

A TRUE BILL

_____
FOREMAN

WILLIAM A. MEADOWS, JR.
UNITED STATES ATTORNEY

BY William A. Daniel, Jr.
Assistant U. S. Attorney

LIBRARY
SUPREME COURT, U. S.

No. 73-[illegible]

Supreme Court, U. S.
FILED
NOV 1 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

BERNARD BERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-411

BERNARD BERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioner and two co-defendants were convicted of conspiring to possess and possessing securities stolen from the mail, in violation of 18 U.S.C. 371 and 1708. Petitioner was sentenced to concurrent terms of three years' imprisonment, subject to the parole provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed (Pet. App. 1-19). The sole issue raised by petitioner concerns the propriety of the judge's instruction with respect to the inference that could be drawn from possession of the stolen securities.

The evidence, which is set out at length in the opinion below, showed that petitioner, working with Pedro Martinez, A. Earl Walters, and Stephen J. Dineen,[1]

[1] Martinez and Walters were tried and convicted with petitioner. Dineen's prosecution was severed after he failed to appear for trial.

arranged for the purchase and disposition of Chesapeake and Potomac Telephone Company bonds, in the face amount of $500,000, which had been stolen from the United States mails eleven months earlier. Petitioner testified in his own behalf and denied any knowledge that the bonds were stolen, even though he and his confederates purchased them for only $50,000 in cash.

Petitioner contends that evidence of possession of stolen securities eleven months after their theft should not permit the trial court to charge the jury that a reasonable inference could be drawn therefrom that the possessor knew the securities were stolen. But the instruction challenged here was in fact made in accordance with petitioner's own request. At a conference prior to the closing arguments and charge to the jury, petitioner's counsel requested an instruction on possession of recently stolen property (Tr. 1120, 1138-1139). Although counsel for Martinez and Walters objected to the instruction (Tr. 1121-1122, 1140), the judge agreed to give it (Tr. 1138-1140). The instruction given emphasized the doubtfulness of any inference based merely upon possession of property stolen at a considerably earlier point in time (Tr. 1322-1323):

> Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of the surrounding circumstances shown by the evidence in the case that the person in possession knew the property had been stolen.
>
> * * * * *
>
> The term "recently" is a relative term and has no fixed meaning. Whether the property may be considered as recently stolen depends upon the nature

> of the property and all of the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft, the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

At the conclusion of the charge, co-defendant Martinez objected to the instruction (Tr. 1335-1336), and co-defendant Walters joined in the objection (Tr. 1336). Petitioner did not join in the objection, which was overruled (Tr. 1337). Having requested an instruction on the inference to be drawn from possession of the securities and having failed to object to its specific terms, petitioner is now barred from challenging it on certiorari. Rule 30, Fed. R. Crim. P.

Moreover, the instruction was proper. This Court has recently approved instructions permitting inference of knowledge of theft from possession (*Barnes* v. *United States,* No. 72-5443, decided June 18, 1973), and the instruction here carefully guarded petitioner against an unwarranted inference by cautioning the jury that "[t]he longer the period of time since the theft, the more doubtful becomes the inference * * *."

There was, in any event, ample evidence from which petitioner's guilty knowledge could be inferred. Petitioner, a lawyer, must have known that valid securities of the kind purchased would not have been sold at 10 percent of their face value, and the elaborate scheme—involving a shell corporation, the "laundering" of checks, and the use of large sums of cash (see Pet. App. 1-3)—he devised to conceal the purchase transaction indicated awareness of the illegality lurking in the history of the bonds.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

DOJ-1973-11